Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD. and ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Petitioners,

vs.

EDISON WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a federal appellate court has jurisdiction to entertain a petition for writ of mandamus where the district court erroneously remanded an action properly removed pursuant to Title 9 U.S.C. §205.

LIST OF PARTIES

The following companies and individuals are parties to the proceeding sought to be reviewed: Petitioners, Ocean Marine Mutual Protection and Indemnity Association, Ltd. and Robert Davis d/b/a Davis Marine Insurance Agency, and the Plaintiff/Respondent Edison Wilson.

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OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD. and ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Petitioners,

vs.

EDISON WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 12, 1993.

REFERENCE TO OPINIONS BELOW

The opinions below consist of: The opinion of the Court of Appeals for the Eleventh Circuit as reprinted in the Appendix, A 1. The three orders of the United States

District Court for the Southern District of Florida (Miami Division) are reprinted in the Appendix; the August 4, 1992 order (First Order) at A 2 through A 5, the October 16, 1992 order (Second Order) at A 6 through A 11, and the January 7, 1993 order (Third Order) at A 12 through A 18.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit sought to be reviewed in this case was entered on October 12, 1993. This Petition for Writ of Certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Andy Corporation of Panama was the owner of the vessel M/V TOMA; ATA Nautical Corporation, another Panamanian corporation, was manager of that vessel (hereinafter "Andy/ATA"). Plaintiff, Edison Wilson, a Nicaraguan citizen and resident (hereinafter "WILSON"), was employed by Andy/ATA on the M/V TOMA. In 1985, during that employment, WILSON was injured while off the M/V TOMA in Mexico as a result of a motorcycle accident.

Petitioner, OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., a Cayman insurance club (hereinafter "OCEAN MARINE"),

insured Andy/ATA's vessel after accepting Andy/ATA's Proposal for Membership in the insurance club and issuing a policy (hereinafter the "Policy"), subject to the Proposal and the Policy rules (hereinafter the "Policy Rules"). Petitioner, ROBERT DAVIS, d/b/a DAVIS MARINE INSURANCE AGENCY (hereinafter "DAVIS"), is alleged to have placed the insurance coverage for the M/V TOMA with OCEAN MARINE for Andy/ATA.

The accident occurred during the period of coverage provided by OCEAN MARINE's Policy. WILSON brought suit against his former employer, Andy/ATA, in the United States District Court for the Southern District of Florida (hereinafter the "Injury Action"). WILSON and Andy/ATA agreed in the Injury Action to a Consent Judgment and Andy/ATA assigned all its rights against OCEAN MARINE and others related to the insurance to WILSON.

After obtaining the Consent Judgment in the Injury Action, WILSON filed this action against OCEAN MARINE and DAVIS in the Circuit Court in and for Dade County, Florida. WILSON asserts that, based on the Assignment from Andy/ATA, he is entitled to enforce Andy/ATA's rights against OCEAN MARINE and DAVIS.[1] WILSON is therefore seeking recovery from

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[1] WILSON claims OCEAN MARINE is responsible for the judgment entered in the Injury Action under the coverage afforded to Andy/ATA, his former employers, as Members of the insurance club. WILSON also alleges that DAVIS, as agent for OCEAN MARINE, wrote, sold or delivered the Policy to Andy/ATA and that DAVIS was vicariously "liable for insurance benefits in place of OCEAN MARINE."

OCEAN MARINE and DAVIS under the OCEAN MARINE Policy. WILSON's assignor, Andy/ATA, agreed when applying for membership in the insurance club, to be bound by the Policy Rules. Policy Rule 37 requires, prior to payment of *any* claims to an insured member, arbitration in London, England of any disputes or differences arising from the Policy. No arbitration has been held nor has WILSON or Andy/ATA, his assignor, ever requested or agreed to arbitration.

On June 24, 1992, DAVIS removed the underlying case, based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") and 9 U.S.C. §205 (the "Convention Act"), to the United States District Court for the Southern District of Florida. On July 1, 1992, OCEAN MARINE entered a Special Appearance consenting to the removal and requesting arbitration in London under the Policy's terms.[2] On July 27, 1993, WILSON filed a motion to remand alleging that DAVIS could not remove the case because the claims against him were not subject to the arbitration agreement. Additionally, WILSON argued that only part of the case was removable, the part as to OCEAN MARINE, and that the claims against DAVIS were not removable.[3] WILSON did not argue that the removal was untimely or that there were any defects in removal procedure. On August 4, 1992, the district court

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[2] OCEAN MARINE re-entered its special appearance at the Eleventh Circuit on jurisdictional grounds and continues to appear before this Court by special appearance.

[3] The District Court rejected WILSON's arguments as lacking merit. (*See*, Second Order A 9-10).

entered an order of remand finding that the removal was untimely because it had not been filed within thirty days of service on the defendants of process in the state court action ("First Order") (A 2).

After confirming that the clerk of the court had not mailed the statutorily required certified copy of the First Order to the circuit court, Petitioners filed a motion to reconsider. The jurisdictional basis for the motion to reconsider was not disputed by WILSON. The district court accepted that it had jurisdiction and, recognizing that its First Order was based on a misreading of the applicable statutes and law, entered an Order Granting Motion for Continuance of August 4, 1992 Order of Remand (the "Second Order"), dated October 16, 1992, vacating the First Order and specifically finding that: 1) it had subject matter jurisdiction; and 2) the arguments raised in WILSON's Motion to Remand "lack merit." (A 6).

WILSON then filed a Motion for Rehearing and Suggestion of Lack of Jurisdiction. WILSON's argument in this motion was that, instantaneously upon the signing of the First Order, the district court lost jurisdiction to reconsider its First Order, regardless of whether or not the clerk had completed its statutorily required duty of notifying the circuit court of that order. The district court accepted WILSON's argument and entered the Third Order, vacating the Second Order and reinstating the First Order. (A 12).

OCEAN MARINE and DAVIS filed a petition for writ of mandamus to the Eleventh Circuit Court of Appeals which was opposed by WILSON. On March 26, 1993, the

circuit court entered an Order staying any orders of the district court and on May 10, 1993, directed the parties to file briefs on two issues: "(1) whether this action was removable under 9 U.S.C. §205, and (2) if so, whether it was properly removed." After full briefing of these issues, the circuit court on October 12, 1993 entered an Order stating:

> The petition for writ of mandamus is dismissed for want of jurisdiction to review the orders in question.
>
> Petitioners' alternative petition for writ of prohibition is dismissed for want of jurisdiction to review the orders in question.
>
> The stay we previously entered is lifted.

(A 1). Petitioners submit this application for Writ of Certiorari to review the Eleventh Circuit's ruling within 90 days from the filing of the circuit court's decision.

REASONS FOR GRANTING THIS PETITION

Long ago in *United States v. Rice*, 66 S.Ct. 835 (1946), this Court held that a district court's remand of an action removed pursuant to a special removal statute was unreviewable. Although *Rice* has not been outright overruled, its precedential value has been substantially eroded both by Congress' amendment of several of the special removal statutes and this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 96 S.Ct. 584 (1976). In addition, one federal court of appeal has simply ignored *Rice* and reviewed an order remanding a case removed under a special removal statute while other courts of

appeal have grudgingly held that they have no jurisdiction to review such orders.

The source of congressional and judicial displeasure with *Rice* is that its overbreadth leads to the frustration of congressional intent in channeling certain cases into federal courts by the enactment of special removal statutes to achieve that policy. The statute at issue here, for example, is intended to channel cases subject to the Convention into federal courts to achieve U.S. compliance with its treaty obligations and uniformity in the implementation of the Convention.

Unless mandamus is granted, the district court's admittedly erroneous First Order will go unreviewed and the petitioners will be denied their right to proceed in federal court. Moreover, Congress' intent to insure uniformity in enforcement of the Convention by channelling Convention Act cases into federal court will be severely undermined.

Congress intended that federal courts have original jurisdiction over cases brought under Title 9 U.S.C. §205.

Under the Convention, to which the United States is a signatory, and the Convention Act, the federal courts have original jurisdiction over this case and thus, this case is removable to the United States District Court. As noted by the Fifth Circuit in *McDermott International v. Lloyds Underwriters of London*, 944 F.2d 1199, 1210 (5th Cir. 1991), Congress' initial hesitancy in ratifying the Convention arose out of a fear that state courts might not enforce foreign arbitration agreements or might apply their own

arbitration laws which may be in conflict with the Convention.[4] Any such actions would violate United States' treaty obligations to enforce the provisions of the Convention. Moreover, under the reciprocity clause of the Convention, inappropriate state court rulings could well frustrate the attempts of U.S. citizens to enforce their arbitration rights in foreign jurisdictions:

> If state courts refuse to promptly enforce arbitration agreements in Convention cases, other signatory nations could cite the Convention's reciprocity clause to justify departing from the Convention in cases involving citizens of states with recalcitrant courts . . . Because the Convention only permits other countries to reciprocally abrogate Convention covenants "to the extent" that our nation does, anomalous state court Convention decisions could only be raised against our citizens . . .

Id. at 1211. These considerations mandate a departure from the traditional tendency to strictly construe removal statutes. *Id.* at 1212-13.

The district court, in its Second Order vacating the First Order of remand, recognized the importance of the presumption in favor of removal in cases involving arbitration clauses covered by the Convention:

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[4] *McDermott* raised the concern that state courts might not even be obligated to enforce the Convention:

> . . . but the only courts, "having jurisdiction under the Convention Act" are federal . . . So section 206, like the FAA's section 4, arguably confers no authority on state courts to compel arbitration. *Id.* at p.1211, n.16.

> The *McDermott* court reasoned that Congress intended to channel cases involving arbitration clauses covered by the [Convention] into the federal courts. *See id.* Congress's efforts to ensure that Convention cases be heard in federal court arise from two concerns. First, Congress was concerned that state courts hearing cases involving clauses requiring foreign arbitration might be less inclined to enforce such clauses. *Id.* If this refusal were widespread, it might induce foreign courts to retaliate by refusing to enforce the Convention in cases involving citizens to the United States. *Id.* Congress thus hoped that federal courts would better ensure reciprocal enforcement of the Convention. Second, Congress was concerned about uniformity. The goal of the Convention was to unify the standards by which agreements to arbitrate are observed and arbitral awards enforced. *Scherk v. Alberto-Culver Company*, 94 S.Ct. 2449, 2457 (1974). A liberal removal statute fosters uniformity by limiting the number of instances in which state courts will have the opportunity to interpret the Convention and thus reducing the possibility of inconsistent interpretations.

See Second Order (A 8).

Therefore, as the district court acknowledged, the action was properly removed under the Convention Act and its remand based on the thirty-day requirement of §1446(b) was erroneous. *See also Matter of Amoco Petroleum, et al.*, 964 F.2d 706 (7th Cir. 1992) (a party may remove an arbitrable matter involving a foreign party "at any time prior to trial" pursuant to the Convention Act and without regard to the thirty-day limits set forth in the general removal statute); *Employers Insurance of Wausau v.*

Certain Underwriters, 787 F.Supp. 165 (W.D. Wis. 1992) (the Convention Act and the Foreign Sovereign Immunities Act are similar in that they are both intended to channel foreign sovereigns away from state courts and into federal court, and they both allow removal after thirty days); *Manas y Pineiro v. Chase Manhattan Bank,* 443 F.Supp. 418, 421 (S.D.N.Y. 1978) (the language: "at any time before trial" contained in the Convention Act means that a case may be removed at any time before there has been litigation on the merits); *Dale Metals Corp. v. Kiwa Chemical Industry Co.,* 442 F.Supp. 78, 81, n.1 (S.D.N.Y. 1977) (the language in the Convention Act regarding the right to removal before trial is explicit).

The district court's First Order frustrates Congress' intent to have Convention Act cases proceed in federal court. The First Order, as acknowledged by the district court in its Second Order, was clearly erroneous and should be reviewed by mandamus.

The applicability of §1447(d) to cases removable under the Convention Act has been limited by Thermtron.

At issue here is the applicability of §1447(d)'s prohibition against review where, as in this case, the action was removed pursuant to a special removal statute. In *Rice,* this Court construed §1447(d)'s predecessor to preclude review of a remand order, even though the case was removed pursuant to a special removal statute. This Court held "these provisions [governing removal procedure and remands] were intended to be applicable not only to remand orders made in the suits removed under [the general removal statutes], but to orders of remand made in cases removed under any other statutes, as

well." 66 S.Ct. at 839. *Thermtron* limited *Rice* by holding that the prohibition of review contained in §1447(d) applies only to remand orders which are within the district court's statutory authority under §1447(c), and that a remand which is based on grounds not appearing in §1447(c) is subject to review by mandamus proceedings. 96 S.Ct. at 590. *See, Royal v. State Farm Fire and Casualty Company,* 685 F.2d 125, 126 (5th Cir. 1982).

Relying on *Thermtron,* the Eleventh Circuit in *In re Federal Savings and Loan Ins. Corp.,* 837 F.2d 432 (11th Cir. 1988) (hereafter *"FSLIC"*) held that §1447(c) does not apply to cases removed pursuant to a special removal statute. In *FSLIC,* the Eleventh Circuit granted a writ of mandamus and vacated a district court's order remanding a case removed by the FSLIC pursuant to 12 U.S.C. §1730(k)(1).[5] That statute, like the Convention Act in this case, authorized the FSLIC, when acting as the receiver for the Federal Savings and Loan Association, to remove a state court action to a United States district court. The district court in *FSLIC* held that the FSLIC improperly removed the case for failure to follow §1446(b)'s requirement of consent of all defendants to removal. Similarly, in this case, the district court applied the thirty day filing

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[5] This statute has since been amended by Congress to allow for appeals of district court's remand orders. *See* §501(1)(3) of the Financial Institutions Reform, Recovery and Enforcement Act, PL No. 101-73, 103 Stat. 183 (codified as amended 12 U.S.C. §§1821 et seq.) This amendment further shows Congress' displeasure with the review preclusion of remand orders in cases removed pursuant to special removal statutes. Unfortunately, Congress has thus far dealt with this problem in a piecemeal fashion.

time requirement of §1446(b) to a removal under the Convention Act. Because the removal in *FSLIC* was made pursuant to a special removal statute, the Eleventh Circuit found that the remand was necessarily based on reasons outside §1447(c) and was therefore not insulated from review by §1447(d). *Id.* at 436, citing *Thermtron*, 96 S.Ct. at 592-93. Since the removal in this case was also made pursuant to a special removal statute, §1447(d)'s non-reviewability provision is inapplicable according to *FSLIC*. Moreover, in *FSLIC*, the district court specifically remanded pursuant to §1447(c). Here, the district court did not even refer to §1447(c) in its First Order of remand. Therefore, notwithstanding *FSLIC's* conflict with *Rice*, the First Order of remand in this case falls within the *Thermtron* exception to review preclusion.

FSLIC is consistent with other circuit court cases which have allowed federal courts to review remand orders in cases removed pursuant to special removal statutes. *See e.g. McDermott*, 944 F.2d at 1212 (a remand order of a case removed pursuant to Title 9 U.S.C. §205 was outside the scope of §1447(c)); *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990) (review by mandamus was appropriate where the district court's remand order lacked statutory basis and was clearly contrary to congressional policy as expressed in the Westfall Act); *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) (a removal effectuated to the bankruptcy court under 28 U.S.C. §1478(a) is a different type of removal from that contained in the general framework of 28 U.S.C. §§1441-1447; therefore, the provisions of §1447(d) were inapplicable); *Massachusetts v. V & M Management, Inc.*, 929 F.2d 830 (1st Cir. 1991) (in action under federal and state housing statutes, a remand

order not issued pursuant to §1447(c) was reviewable); *In re Savers Federal Savings & Loan Assoc.*, 872 F.2d 963, 965 (11th Cir. 1989) (relying on its decision in *FSLIC*, the Eleventh Circuit held that an order remanding a properly removed action was subject to a writ of mandamus).

Several circuits, however, have criticized the Eleventh Circuit's opinion in *FSLIC*.[6] *See In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3rd Cir. 1991);[7] *In re*

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[6] Despite its opinion approving of *FSLIC* in *In re Savers*, 872 F.2d at 965, the Eleventh Circuit *In re Ocean Marine Mutual Protection and Indemnity Association, Ltd., et al.*, 3 F.3d 353, 356 n.4 (11th Cir. 1993) recently acknowledged the cases criticizing its decision in *FSLIC* and stated in a footnote that mandamus is only appropriate to review remand orders in actions removed pursuant to 12 U.S.C. §1730(k)(1) (1988):

> We have previously stated that "[s]ection 1447(c)'s application is . . . limited to cases removed from State Court pursuant to §1441(a)." . . . We made this statement in a case removed under 12 U.S.C. §1730(k)(1) (1988), which authorizes the FSLIC to remove to federal court when acting as the receiver of a federal savings and loan association; it is dictum as to cases removed under other statutes . . .

This holding was dictum to the issues before the court in *Ocean Marine*. It improperly and arbitrarily treats litigants under special removal statutes differently and should not be followed here.

[7] In *TMI*, the district court remanded a case on the finding that it lacked subject matter jurisdiction. On appeal, the Third Circuit thoroughly reviewed the history of §1447(d) and held that it had the authority to review the district court's remand order. Although the district court specifically remanded pursuant to §1447(c), the Third Circuit held that the district court's decision was "not the type routinely and regularly made pursuant to §1447(c)" and that it was "not the type of federal subject matter jurisdictional decision intended to be governed

Federal Savings and Loan Insurance Corp., 881 F.2d 564 (8th Cir. 1989); *Federal Savings & Loan Insurance Corp. v. Frumenti Development Corp.*, 857 F.2d 665 (9th Cir. 1988). The Ninth Circuit in *Frumenti* opines that the decision in *FSLIC* is in conflict with *Rice*. The *Frumenti* Court, however, acknowledges that *Rice's* holding has been narrowed by *Thermtron*:

> *Thermtron* creates an exception to §1447(d)'s general review preclusion only for remand orders that are not based on jurisdictional grounds.

Id. at 670. Since the remand in *Frumenti* was expressly based on jurisdictional grounds, *Thermtron* was of no avail. *Id.*[8] Here, however, the remand was not based on

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by the terms, or policy underlying §1447(c)." *Id.* at 844 and 845. Therefore, although the *TMI* Court criticizes the Eleventh Circuit decision in *FSLIC*, it nonetheless concludes that it had the authority to review a district court's remand order.

[8] Additionally, other cases have avoided the effect of §1447(d) where the remand was not made on jurisdictional grounds. *See e.g., Maniar v. F.D.I.C.*, 979 F.2d 782, 784 (9th Cir. 1992) (the appeal of a remand order in a case removable under the FDIC removal statute was permitted and the order vacated); *Air-Shields, Inc. v. Fullan*, 891 F.2d 63 (3d Cir. 1989) (petition for writ of mandamus was granted directing the court to vacate a remand order based on procedural defects not contemplated by §1447(c)); *Clorox Company v. United States District Court*, 779 F.2d 517 (9th Cir. 1985) and *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984) (under what has become known as the Clorox/Pelleport doctrine, a district court's remand order can be reviewed if based on a prior determination of a substantive issue of law apart from any jurisdictional issue); *Levy v. Weissman*, 671 F.2d 766 (3d Cir. 1982) (remand order was subject to review based on the failure of the removing party to comply with a local rule of the district court.)

jurisdictional grounds and therefore, the *Thermtron* exception to review preclusion controls.

The district court's remand order does not fall under §1447(c).

§1447(c) deals with procedure after removal and specifically provides:

> A motion to remand the case *on the basis of any defect in removal procedure* must be made within thirty days after the filing of the notice of removal under §1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. [Emphasis supplied.]

It is undisputed that the district court did not remand for lack of subject matter jurisdiction. The question is therefore whether the plaintiff sought to remand the case on the basis of a "defect in removal procedure". As is evident from the plaintiff's motion to remand and memorandum of law in support, no defects in the removal procedure were ever raised.

Admittedly, the district court's First Order was not based on those grounds raised in plaintiff's motion to remand:

> The Court also finds that the contentions offered in support of Plaintiff's Motion for Remand lack merit.

See Second Order (A 9). Rather, the district court, sua sponte, held that the thirty day requirement of §1446(b)

was applicable to removal under the Convention Act.[9] The district court later held that its First Order of remand was wrong. *See* Second Order (A 11). The fact that the First Order remanded on erroneous procedural grounds should have no bearing on the applicability of §1447(c). If a district court's erroneous application of the removal statute is binding, this Court's decision in *Thermtron* would be nullified. The intent of *Thermtron* is to determine whether a district court's remand of a case is outside of its statutory authority; if a court erroneously claims it has statutory authority to enter a remand order, that decision should not go unreviewed under *Thermtron*. Since this case was not remanded pursuant to §1447(c), mandamus is appropriate to review and vacate the district court's First Order of remand.

The conflict among the circuit courts must be resolved.

Petitioners submit that mandamus should issue to review the district court's First Order of remand under *Thermtron*. Petitioners recognize, however, that the issue of whether cases removed under special removal statutes fall within the *Thermtron* exception to review preclusion, is presently unresolved. Specifically, this Court has not rendered any decisions regarding the reviewability of remand orders not based on jurisdictional grounds and

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[9] The procedural defect, even if correct, was waived by WILSON's failure to assert it within thirty (30) days of the filing of the Notice of Removal. *Maniar*, 979 F.2d at 784-5. Also, it could not have been raised by the District Court, *sua sponte*, more than thirty (30) days after the removal. *Id.*

where removal was authorized by a special removal statute. As a result, the circuit courts are in constant conflict and disarray over which remand orders are reviewable by mandamus or otherwise. As noted by the Ninth Circuit in *Frumenti,* the decision to not review remand orders involving special removal statutes is inconsistent with Congress' intent to confer federal jurisdiction. 857 F.2d at 670. The Court noted that although Congress' amendment of the special removal statute in *Rice* "undoubtedly evidenced some displeasure with *Rice,*" the *Rice* decision was nonetheless controlling where a remand was based on jurisdictional grounds. The *Frumenti* Court concluded: "Congress and the Supreme Court may be in a position to respond to the FSLIC's concerns; we are not." *Id.* This Court must recognize the conflict among the circuits and should finally settle this important question of federal law. This case presents an appropriate vehicle for such a decision.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to consider and determine that the federal appellate courts have jurisdiction to review by mandamus district court orders erroneously remanding actions properly removed pursuant to Title 9 U.S.C. §205.

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4145

(Filed Oct. 12, 1993)

IN RE:

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD. and ROBERT DAVIS, d/b/a DAVIS MARINE INSURANCE AGENCY,

Petitioners.

On Petition for Writ of Mandamus or
on Petition for Writ of Prohibition to the
United States District Court for the
Southern District of Florida

Before EDMONDSON, COX and CARNES, Circuit Judges.

BY THE COURT:

The petition for writ of mandamus is dismissed for want of jurisdiction to review the orders in question.

Petitioners' alternative petition for writ of prohibition is dismissed for want of jurisdiction to review the orders in question.

The stay we previously entered is lifted.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-1505-CIV-NESBITT

EDISON WILSON,

Plaintiff,

vs.

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Defendant.

_____/

ORDER OF REMAND

(Filed Aug. 4, 1992)

This Cause comes before the Court upon Plaintiff's motion for remand. Defendant Robert Davis d/b/a Davis Marine Insurance Agency ("Davis") filed a notice of removal on June 25, 1992. Defendant Ocean Marine Mutual Protection and Indemnity Association, Ltd. ("Ocean Marine") subsequently entered a special appearance for the purpose of consenting to the removal on July 2, 1992.

Davis removed the case pursuant to 9 U.S.C. § 205. That section allows removal of an action that relates to an arbitration agreement or award that falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1]. The section allows removal at "any

[1] Section 205 provides specifically that:
Where the subject matter of an action or proceeding pending in a State court relates to an arbitration

time before trial" and thus appears to eliminate the requirement that the petition for removal be filed within thirty days after the defendant receives a copy of the initial pleading through service or, if the case stated by the initial pleading is not removable, after the case becomes removable. *See* 28 U.S.C. § 1446(b).

A closer examination, however, reveals that section 205 retains the thirty day requirement set out in 28 U.S.C. § 1446(b). Section 1446(b) permits the removal of a case after trial if the case was not removable before trial, but became so after trial commenced. The Court finds that Congress intended the language in section 205 permitting removal to "any time before trial" to preclude removal after trial – not to have repeal the thirty day requirement. This intent is evidenced by the following passage from section 205:

> The procedure for removal of causes otherwise provided by law shall apply, *except that the*

> agreement or award falling under the Convention (on the Recognition and Enforcement of Arbitral Awards), the defendants or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district to which it is removed.

9 U.S.C. § 205 (1992).

> *ground for removal provided in this section need not appear on the face of the complaint but may be provided in the petition for removal.*

28 U.S.C. § 205 (emphasis added). The exception clause in the above language indicates that Congress was explicit about those aspects of the general removal procedure in section 1446 that it did not wish to apply to cases removed pursuant to section 205. The fact that Congress failed to explicitly include reference to the thirty day requirement in this exception clause indicates that Congress intended to retain the requirement for section 205 removals[2].

The removal petition filed by Davis in the present case does not satisfy the thirty day requirement. As noted above, a defendant must file a removal petition within thirty days after receipt of a copy of the initial pleading. In the present case, Davis received a copy of the summons and complaint on March 4, 1992, but did not file its notice of removal until June 25, 1992 – well beyond the thirty day period. Accordingly, it is hereby

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[2] The Court is aware that one court in another jurisdiction has taken an opposing view. In *Dale Metals Corp. v. Kiwa Chem. Ind. Co., Ltd.*, 442 F.Supp. 78, 81 n.1 (S.D.N.Y. 1977), the United States District Court for the Southern District of New York held that "the notion that the time provision of 28 U.S.C. § 1446(b) applies is totally without merit." The court, however, provided no analysis in support of this conclusion beyond a mere citation to the language in section 205 permitting removal at any time before trial. As the discussion above indicates, a more careful analysis reveals that this language was *not* intended to eliminate the section 1446(b)'s thirty day requirement. Accordingly, this Court must respectfully part company with the Southern District of New York on this issue.

ORDERED AND ADJUDGED that the above-styled cause is remanded to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of August 1992.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

copies provided:

counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EDISON WILSON,

Plaintiff,

vs.

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Defendants.

CASE NO. 92-1505-CIV-NESBITT

ORDER GRANTING MOTION FOR CONTINUANCE OF AUGUST 4, 1992 ORDER OF REMAND

(Filed Oct. 19, 1992)

This Cause comes before the Court upon Defendant Robert Davis d/b/a Robert Davis Marine Insurance Agency's ("Davis") Motion for Reconsideration of the Court's Order issued on August 4, 1992 remanding the case to state court. Davis filed a notice of removal on June 25, 1992. Defendant Ocean Marine Mutual Protection and Indemnity Association, Ltd. ("Ocean Marine") subsequently entered a special appearance on July 2, 1992 for the purpose of consenting to the removal. On August 4, 1992, the Court issued an Order remanding the case to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Davis responded to this Order with the instant motion for reconsideration. This motion has now been fully briefed and is ripe for disposition.

BACKGROUND

Davis removed the case pursuant to 9 U.S.C. § 205. That section provides that:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention (on the Recognition and Enforcement of Arbitral Awards), the defendants or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district to which it is removed.

9 U.S.C. § 205 (1992). In its Order of Remand, the Court determined that the phrase "any time before trial" simply precludes removal after trial has commenced and does not eliminate the requirement that the notice of removal be filed within thirty days after the case becomes removable. This determination was based on the fact that the exception clause in section 205 fails to include explicit reference to the thirty day requirement. This Court reasoned that this clause indicates that Congress was explicit about those aspects of the general removal procedure from which it intended to exempt section 205 removals and concluded that Congress's failure to include the

thirty day rule among those requirements indicates an intent to retain the rule.

Defendant has brought to the Court's attention a recent Fifth Circuit decision, *McDermott v. Lloyd's of London*, 944 F.2d 1199 (5th Cir. 1991), which it asserts controls the issue of whether a section 205 must comply with the thirty day limit in the general removal statute. 28 U.S.C. § 1446(b). The *McDermott* court reasoned that Congress intended to channel cases involving arbitration clauses covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") into the federal courts. *See id.* Congress's effort to ensure that Convention cases be heard in federal court arose from two concerns. First, Congress was concerned that state courts hearing cases involving clauses requiring foreign arbitration might be less inclined to enforce such clauses. *Id.* If this refusal were widespread, it might induce foreign courts to retaliate by refusing to enforce the Convention in cases involving citizens of the United States. *Id.* Congress thus hoped that federal courts would better ensure reciprocal enforcement of the Convention. Second, Congress was concerned about uniformity. The goal of the Convention was to unify the standards by which agreements to arbitrate are observed and arbitral awards enforced. *Scherk v. Alberto-Culver Co.*, 94 S.Ct. 2449, 2457 (1974). A liberal removal statutes fosters uniformity by limiting the number of instances in which state courts will have the opportunity to interpret the Convention and thus reducing the possibility of inconsistent interpretations.

Plaintiff does not address any of the preceding analysis. Instead, Plaintiff relies on *In re Savers Federal Savings*

& Loan Association, 872 F.2d 963 (11th Cir. 1989). In *In re Savers*, the Eleventh Circuit held that a state case against the Federal Savings and Loan Insurance Corporation did not cease to be an "action from a State court" within the meaning of 12 U.S.C. § 1730(k)(1)(C), where there had been a final judgment by a state trial court, but where the period for appeal had not yet lapsed. In support of its holding, the court cited 12 U.S.C. § 632, the Federal Reserve Bank removal statute. The court asserted that, if Congress had intended 12 U.S.C. § 1730(k)(1)(C) to preclude removal after issuance of a final judgment in state court, it could have adopted the language in 12 U.S.C. § 632 requiring removal be made "at any time before trial". The court thus found that the quoted language precludes removal after trial, but nowhere suggested that this language does not also eliminate the thirty day requirement. Accordingly, the Court finds that *In re Savers* has no bearing on the issue before this Court.

The Court also finds that the contentions offered in support of Plaintiff's Motion for Remand lack merit. Plaintiff originally sought remand on the ground that his claims against Davis are unrelated to the arbitration clause on which removal is based. Plaintiff obtained a consent judgment against the owners of the vessel on which he was injured and was assigned their rights against Ocean Marine – the insurer of the vessel. The contract between these owners and Ocean Marine includes the arbitration clause on which removal was premised. Plaintiff contends that Davis – as the agent that procured the insurance coverage for Ocean Marine – is therefore not a party to the contract and that his action against Davis is not related to an arbitration agreement

covered by the Convention. Plaintiff further contends that section 205 does not authorize the removal of joined claims.

The record does not support Plaintiff's position. Plaintiff's Complaint seeks recovery from Davis as an agent of Ocean Marine under section 626.901 of the Florida Statutes. That section imposes vicarious liability upon the in-state agent or any insurance company not authorized to transact business in the state, for payments which the insurance company was obligated to make, but failed to make. The Complaint also seeks damages for Davis's alleged failure to place the insured with a reliable insurance company.

The viability of these claims against Davis may turn on whether Plaintiff prevails on his claims against Ocean Marine. Davis cannot be vicariously liable for Ocean Marine's failure to honor its obligation unless Ocean Marine is found to have had such an obligation. Further, Davis cannot have placed Plaintiff with an unreliable insurer unless Ocean Marine is found to have been unreliable. Whether Ocean Marine failed to honor an obligation to Plaintiff will likely have a substantial bearing on whether Ocean Marine is found to be unreliable. As a consequence, the viability of Plaintiff's claims against Davis may turn on the outcome of the arbitration proceedings involving Ocean Marine. The arbitration clause at issue may determine the forum in which these proceedings occur. On this basis, the Court finds that, for purposes of section 205, Plaintiff's claims against Davis relate to the agreement to arbitrate in the contract involving Ocean Marine.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Davis's Motion for Reconsideration is GRANTED. The Court's Order of August 4, 1992 remanding the case to state court is VACATED and Plaintiff's Motion for Remand is DENIED. The case will proceed before this Court.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of October 1992.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-1505-CIV-NESBITT

(Filed Jan. 12, 1993)

EDISON WILSON,

Plaintiff,

vs.

OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., ROBERT DAVIS d/b/a DAVIS MARINE INSURANCE AGENCY,

Defendant.

_____/

This cause comes before the Court upon Plaintiff Edison Wilson's Motion for Rehearing and Suggestion for Lack of Jurisdiction. The motion requests that this Court vacate its Order of October 16, 1992, in which the Court reconsidered and vacated its earlier order remanding the case to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Plaintiff contends that once a federal district court has entered an order of remand, the court never has jurisdiction to reconsider that order.

28 U.S.C. § 1447(d) precludes review of an order of remand "on appeal or otherwise"[1]. In *Harris v. Blue Cross/*

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[1] Section 1447(d) provides that:
An order remanding a case to the State court from which it was removed is not reviewable on appeal or

Blue Shield of Alabama, Inc., 951 F.2d 325, 330 (11th Cir. 1992), the Eleventh Circuit held that the quoted phrase covers reconsideration by the district court that entered the order. The *Harris* court stated that:

> [T]here is no more reason for a district court being able to review its own decision, and revoke the remand, than for an appellate court requiring it do so. Both are foreclosed; nothing can be more inclusive than the phrase "on appeal or otherwise" [in § 1447(d)]. The district court has one shot, right or wrong.

Id. at 330 (quoting *in re La Providencia Development Corp.*, 406 F.2d 251 (1st Cir. 1969)).

Defendants, however, contend that a federal district court has jurisdiction to reconsider its order of remand before the clerk of the court mails a certified copy of the order to the state court. Defendants assert that the Eleventh Circuit did not address this precise issue in *Harris*. In *Harris*, the clerk had already mailed a certified copy of the district court's remand order at the time that the district court reconsidered that order. Accordingly, the Court agrees that *Harris* did not address the issue that confronts the Court in the instant case.

The Court also notes that there is significant authority supporting Defendants' position. In *Cook v. J.C. Penney Co., Inc.*, 558 F.Supp. 78, 79 (N.D.Iowa 1983), for instance,

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otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable on appeal or otherwise.

the United States District Court for the Northern District of Iowa stated that:

> [t]he federal court is not divested of jurisdiction to reconsider or vacate the order of remand until the order of remand has been entered and a certified copy of the order has been mailed to the clerk of the state court . . . Normally, a certified copy should have been mailed to the clerk of the state court on the same date. However, due to a mistake in the Federal Clerk of Court's office, as of this date, no such copy has been sent. Thus, this court has not been divested of jurisdiction and may reconsider the order of remand.

Several prominent treatises also endorse this rule. 1A Jeffrey C. Moore et al., Moore's Federal Practice ¶ 0.169[2.---1] (2d Ed. 1992) ("Although the district court's remand order of a non-§1443 action is not reviewable, this does not mean it is instantly irrevocable. Under the prior statute, despite strong language to the effect that when district court orders remanded 'such remand shall be immediately carried into execution,' it was held that this did not deprive the district court of jurisdiction. This meant that steps were taken promptly to carry the remand into effect, but until these steps were taken the district court had power to vacate its order. This is true under the present statute since it does not command immediate execution of the remand order. But the entry of the order of remand and the mailing of a certified copy to the clerk of the state court completely divests the federal court of jurisdiction so that it is powerless to vacate the order of remand."); Charles A. Wright, et al., 14A Federal Practice and Procedure § 3739 (2d Ed. 1985)

("An order of remand ends the jurisdiction of the federal court. The court is required to mail a certified copy of the order to the clerk of the state court, and *upon the state court's receipt of this copy,* the federal court is without power to vacate the order to remand, even if it is persuaded that the order was erroneous." (emphasis added)).

A rule permitting the Court to exercise jurisdiction to reconsider its order of remand would create two related problems, however. First, the rule would condition the existence of jurisdiction on a ministerial act to be performed by the clerk. *The clerk,* not the court, would thus have the power to deprive the court of jurisdiction. *See Van Ryn v. Korean Air Lines,* 640 F.Supp. 284 (C.D.Cal. 1985) ("Logic . . . indicates that it should be the action of a court (entering an order of remand) rather than the action of a clerk (mailing a certified copy of the order) that should determine the vesting of jurisdiction.").

Second, the rule would be inconsistent with the purpose underlying section 1447(d) – the statute prohibiting review of orders of remand. That section provides that:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

The Court in *La Providencia* aptly summarized the purpose of this bar against review of remand orders when it stated that:

> Removal . . . is a privilege to be strictly construed . . . and the state proceedings are to be interfered with once, at most. This is not only in the interest of judicial economy, but out of respect for the state court and in recognition of the principles of comity. The action must not ricochet back and forth depending upon the most recent determination of a federal court.

406 F.2d at 252.

At first blush, allowing the district court to reconsider an order of remand before the clerk mails a certified copy of the order to state court appears to be consistent with this purpose. If the clerk never mails a certified copy of the order of remand, then the state court will never have received official word that the case was remanded. The state court will therefore not reassert jurisdiction of the matter and comity will not be upset by reconsideration.

A different picture emerges if the clerk inadvertently mails a copy of the order of remand *after* the court issued an order vacating the order of remand, however. Clearly the court had jurisdiction to reconsider the order of remand before the clerk mailed the order. What effect does the clerk's subsequent act of mailing the order have on the court's jurisdiction? If the clerk's act has no effect on the court's jurisdiction, then the act has no effect on status of the court's order vacating remand. In this situation, however, the state court will first receive a certified copy of the court's order remanding the case and later receive a copy of the court's order vacating the order of remand. In the interim between receipt of these two orders the state court will likely reassert its jurisdiction

over the case and recommence the proceedings. The case will thus "richochet" back and forth between state and federal court – creating all of the risks that Congress intended section 1447(d) to prevent. These risks include the risk that judicial resources will be wasted and the risk that friction will arise between the state and federal systems.

For instance, proceedings that the state court initiates after receiving a copy of the order of remand will consume the time and resources of the state court. The proceedings cannot be valid, however, because the state court lacks subject matter jurisdiction over the case at the time of the proceedings. The proceedings will thus represent a needless expenditure of the state's judicial resources; an expenditure that would not have occurred but for a clerical error in federal court. Results of this kind erode comity between the state and federal systems.

Such results will be less likely to occur if the clerk's act of mailing a certified copy of the order of remand retroactively deprives the federal district court of the jurisdiction to reconsider its order of remand. Under these circumstances, the clerk's act would invalidate the court's order vacating remand. As a consequence, state proceedings commenced after receipt of an order of remand would remain valid. Upon receiving a certified copy of an order of remand, a state court could proceed with the case without fear that its efforts would be wasted.

While this rule would minimize the risk to state-federal comity, the rule would permit a ministerial mistake of the court clerk to deprive the court of jurisdiction

and to invalidate the order of an Article III judge. As noted above, this result defies logic. The Court does not believe that Congress intended this result when it drafted section 1447(d).

The Court adopts the only rule that avoids this quandary – the rule urged by Plaintiff. Accordingly, the Court finds that it does not have jurisdiction to reconsider an order of remand once that order has been issued, regardless of whether or not the clerk has mailed a certified copy of the order to the state court[2]. This rule is fully consistent with the Eleventh Circuit's decision in *Harris*, under which a district court has "one shot and one shot only" with respect to remand. 951 F.2d at 330.

In accordance with the rule adopted by the Court, it is hereby

ORDERED and ADJUDGED that the Court's Order of October 16, 1992 in VACATED. It is further ORDERED and ADJUDGED that the Court's Order of Remand of August 4, 1992 is reinstated in full force and effect.

DONE and ORDERED, in chambers, Miami, Florida, this 7th day of January 1993.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

cc: counsel of record

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[2] The Court does not intend to suggest that it lacks jurisdiction to reconsider orders of remand issued pursuant to 28 U.S.C. § 1443. Congress explicitly conferred such jurisdiction in 28 U.S.C. § 1447(d).